(3)

No. 04-11

IN THE

Supreme Court of the United States

PACIFIC PROPERTIES AND DEVELOPMENT CORPORATION, PETITIONER

v.

RONALD RAY SMITH AND DISABLED RIGHTS ACTION COMMITTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. THE NINTH CIRCUIT'S DECISION NECESSARILY INCLUDED THE QUESTION PRESENTED BY THIS PETITION 1

III. THIS CASE DOES NOT INVOLVE A CLAIM OF INJURY TO A CONGRESSIONALLY CREATED RIGHT 2

IV. RECOGNIZING REPRESENTATIONAL STANDING FOR DRAC IN THIS CASE IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT 3

V. CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

FRIENDS OF THE EARTH, INC. v. LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC. 528 U.S. 167 (2000) 4

LUJAN v. DEFENDERS OF WILDLIFE, 504 U.S. 555, 112 S.CT. 2130 (1992) 1, 2

MISCELLANEOUS

42 U.S.C. §3604(d) 3

42 U.S.C. §3604(f)(2) 2

I. Introduction

Petitioner, Pacific Properties And Development Corporation, hereby replies to the Brief in Opposition to the Petition for Writ of Certiorari previously filed by Respondent, Disabled Rights Action Committee (hereinafter DRAC).

Pacific wishes to address several new matters raised in DRAC's Opposition through this Reply Brief. The matters to be addressed will be: DRAC's incorrect assertion that the questions presented by the Petition for Writ of Certiorari were not addressed by the Ninth Circuit; the fact that DRAC incorrectly claims that its standing is based on injury to a statutorily created right; and the fact that DRAC misconstrues the prior decisions of this court to allow standing in this case. Each of these issues will be addressed individually below.

II. The Ninth Circuit's Decision Necessarily Included the Question Presented by This Petition

DRAC initially claims that Pacific Properties' Petition for a Writ of Certiorari should be denied because the Ninth Circuit's opinion was limited to an interpretation of whether DRAC's claim came under the Fair Housing Act. The Ninth Circuit did in fact interpret 42 U.S.C. §3604(f)(2) to encompass DRAC's claims. However, by necessity that interpretation included a decision that the injury DRAC's members claimed passed constitutional muster. This Court has previously noted that the "irreducible constitutional minimum" of standing requires an injury in fact. *Lujan*

v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136 (1992). Since the injury requirement is constitutionally based, the Ninth Circuit's decision that mere observation of allegedly discriminatory construction was a sufficient injury to allow a plaintiff to bring a claim under § 3604(f)(2) must be consistent with constitutional precedent setting forth the parameters of the injury in fact requirement. Therefore, by definition, the Ninth Circuit's decision included a decision that mere observation of allegedly discriminatory construction is an injury in fact as previously defined by this Court. The fact that the Ninth Circuit did not articulate that decision does not mean that it did not address this issue. Failure to articulate a constitutional analysis does not relieve the Ninth Circuit of its obligation to ensure that its decisions are consistent with constitutional requirements. Put simply, the statutory construction engaged in by the Ninth Circuit raises the question presented in this Petition because the Ninth Circuit has engaged in that construction in a manner which would violate the United States Constitution. Apparently under DRAC's analysis, a circuit court is entitled to interpret statutes in a manner that would violate the Constitution so long as their decision does not state that they are considering the constitutional issues. Such a position is obviously ludicrous and should be not accepted by this Court.

III. This Case Does Not Involve a Claim of Injury to a Congressionally Created Right

DRAC claims that its members would have standing because they claim injuries to congressionally created rights. Congress does have the power to

legislate new substantive rights, and injuries to those rights do convey standing. However, the key factor missing from DRAC's analysis is an explanation of what congressionally created right it claims is involved in this case. If this case involved claims under 42 U.S.C. §3604(d), then DRAC's argument would apply. In those cases, plaintiffs who receive false information suffer injury to their right to be free from misrepresentations regarding housing. In order for DRAC's argument to be applicable to this case, the Court would have to determine that Congress had created a right for people not to see allegedly discriminatory construction. DRAC provides no authority for its claim that Congress created such a right, and the reason for that omission is simple, Congress did not create such a right, and DRAC's arguments in this regard are inapplicable to this case. This case simply involves DRAC's claim that Pacific violated a congressional prohibition against discriminatory construction. Pacific has quite simply pointed out that DRAC has suffered no injury, within the meaning of the Constitution, as a result of any of Pacific's alleged conduct.

IV. Recognizing Representational Standing for DRAC in This Case Is Inconsistent With Prior Decisions of This Court

DRAC claims that the injuries its members allegedly suffered are consistent with injuries this Court previously determined to be sufficient to convey standing, particularly injuries suffered by testers. Again, DRAC's arguments on this point simply miss the mark. Regardless of what type of standing a party seeks, a necessary predicate to having standing is that

that party has suffered an injury. DRAC claims here that it is relying on tester standing and then goes on to highlight why they have not alleged sufficient injury in this case to have any type of standing. DRAC notes that in previous cases tester standing has been upheld because a tester's right to receive truthful information had been violated. Again, that is not the case here. The only injury claimed by DRAC is that somebody observed a condition which they allege constitutes discrimination. The Ninth Circuit held that mere observation of that allegedly discriminatory condition constituted a sufficient injury for standing. DRAC has not alleged the type of injury suffered by testers in the cases it cites. Indeed, DRAC has not suffered the type of injury experienced by any of the Plaintiffs in any of the cases it cites. For example, DRAC claims that the type of injuries that it alleges in this case are the same as the injuries this Court recognized in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* 528 U.S. 167, 183 (2000). However, in that case, the Court based the sufficiency of the claimed injury on the fact that plaintiffs would have actually used the affected areas but for the defendants conduct. Since the defendants conduct allegedly prevented the plaintiffs from exercising a right they would have exercised in the absence of the defendant's conduct, the plaintiffs alleged an injury. Those allegations of injury are drastically different from what DRAC claims here. The sole injury alleged by DRAC to support its claim of representational standing is that one or more of its members observed allegedly discriminatory conditions at a location they had no particular interest in.

V. Conclusion

DRAC claims that petitioner seeks to limit standing to cases where plaintiffs are injured by a particular means, but that misstates the issue. Pacific simply seeks to limit standing to those plaintiffs who have suffered an injury in fact as required by the Constitution. At issue is not the means by which someone supposedly suffers an injury, at issue is the nature of the injury itself. The nature of the injury approved by the Ninth Circuit in this case was mere observation of allegedly discriminatory construction. This Court has never determined that a Plaintiff alleging an injury like the injury DRAC claims had standing and indeed has rejected analogous claims of standing. Since the Ninth Circuit determined that DRAC does have standing based on these alleged injuries, the finding by the Ninth Circuit is contrary to the previous decisions of this Court. Accordingly, the appropriate course of action is for this Court to grant Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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